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**In the Supreme Court of the United States**

**OCTOBER TERM, 1958**

**MELROSE DISTILLERS, INC., ET AL., PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT**

**BRIEF FOR THE UNITED STATES**

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## OPINION BELOW

The opinion of the Court of Appeals (R. 68-74) is reported at 258 F. 2d 726. The opinion of the district court (R. 40-52) is reported at 138 F. Supp. 685.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1958 (R. 74). The petition for a writ of certiorari was filed on September 26, 1958, and was granted on November 10, 1958 (limited to Question 1 presented by the petition) (R. 75). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

In granting the writ of certiorari in this case the Court limited the questions presented to the following:

Can a Maryland corporation or a Delaware corporation be further criminally prosecuted (in a federal court for a federal offense) following its dissolution under the laws of the state of its creation occurring after indictment but before arraignment or plea, such dissolution timely appearing of record in the case?

### STATUTES INVOLVED

At the time of the indictment the pertinent sections of the Sherman Act, 26 Stat. 209, as amended, provided:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: \* \* \*. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000 \* \* \* [15 U.S.C. 1.]

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by

fine not exceeding \$5,000 \* \* \*. [15 U.S.C. 2.]

SEC. 8. The word "person", or "persons", wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. [15 U.S.C. 8.]

Section 278, Delaware General Corporation Law (Section 278, Title 8, Chapter 1, Delaware Code Annotated, 1953), provides in pertinent part:

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed.

Section 78(a), Article 23, Annotated Code of Maryland, 1951, provides in part as follows:

The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued with such substitution of parties, if any, as the court directs. \* \* \*

Other relevant provisions of the Delaware and Maryland Codes are set out in the Appendix, *infra*, pp. 28-30.

#### STATEMENT

On April 6, 1955, an indictment was returned charging 14 corporate manufacturers; 7 corporate wholesalers, 3 trade associations, and 31 individuals, with conspiring to fix the wholesale and resale prices of alcoholic beverages shipped in interstate commerce into Maryland, and with conspiring to monopolize and attempting to monopolize such commerce, in violation of Sections 1 and 2 of the Sherman Act (R. 1-12). The gravamen of the price-fixing conspiracy was a scheme, enforced by boycott, to compel manufactures and wholesalers to establish "fair-trade" prices, and to compel retailers to observe such prices (R. 9).

Petitioners, which were wholly owned subsidiaries of defendant Schenley Industries, Inc. (Schenley), were 3 of the 14 corporate defendant manufacturers (R. 2). Two of them (Melrose Distillers, Inc. and CVA Corporation) were Maryland corporations; the third (Dant) was a Delaware corporation. (R. 2).

On May 2, 1955—almost a month after the indictment was returned—petitioners were dissolved (R. 15-18, 22, 26-29). They then moved to dismiss the indictment on the ground, *inter alia*, that their dissolution abated the proceeding as to them (R. 14, 21, 25, 37-39).<sup>1</sup>

The district court denied petitioners' motions (R. 46-53). It ruled that "under the applicable Delaware and Maryland statutes, the corporate existence of the dissolved corporations continues to a sufficient extent to permit the prosecution of this criminal proceeding" (R. 52).

Petitioners (together with a number of other defendants) then pleaded *nolo contendere* (R. 60-65) and were fined the following amounts: Melrose, \$5,000; CVA, \$6,000; Dant, \$7,500 (R. 55-57).

Upon appeal, the Court of Appeals unanimously affirmed. The court, noting that there is a "division of authority" among the circuits, held (R. 69-73) that the Delaware corporation statute, which provides for continuation after dissolution of "any [pending] action, suit, or proceeding," covers criminal proceedings. It further ruled (R. 73) that the Maryland statute "in all its essentials" is "of like effect"; and it stated (R. 71) that to accept petitioners' construction of those acts "would offend our sense of justice, pervert the obvious policy of the state in enacting these survival statutes, and provide an easy avenue of escape by corporations from the consequence of

<sup>1</sup> Upon arraignment on June 28, 1955, a plea of "not guilty" was entered for each petitioner.

their criminal acts by the simple process of voluntary dissolution."

Certiorari was sought to review this ruling and, also, whether the Maryland Alcoholic Beverages Law immunized the conspiracy from Sherman Act prosecution. This Court limited review to the first question (R. 75).

#### SUMMARY OF ARGUMENT

I. The voluntary dissolution of a corporation is not the same as the death of an individual, and the considerations requiring abatement of pending criminal actions in the latter situation do not apply to the case of a corporate dissolution. A fine levied upon a dissolved corporation would affect and punish the same persons as before dissolution, namely the stockholders. Permitting a corporate defendant, through voluntary dissolution, to escape criminal responsibility imposed upon it by the Sherman Act would undermine the deterrent effect of the law and make possible evasion of the consequences of a criminal act by transfer of a dissolved corporation's operations intact to a newly created corporation or to another division of its controlling parent. Consequently, considerations of public policy do not support giving to the state laws governing the continued existence of dissolved corporations the restrictive interpretations urged here by petitioners, which, in effect, would preclude any continuing criminal liability unless it is expressly provided for.

The broad provision in the Delaware corporation law that "any action, suit, or proceeding" begun

within a period of three years after dissolution shall not abate clearly encompasses criminal prosecutions. This is established by the ordinary and generally accepted meaning of the terms (particularly "proceeding"), by the use of the term "proceeding" in connection with criminal prosecutions in other provisions of the Delaware Code and in the Delaware Rules of Criminal Procedure, and by the weight of judicial authority construing this and similar language. Nor is a more restricted interpretation required by any other provision of the Delaware Code.

Similarly, the Maryland provision that dissolution shall not "abate any pending suit or proceeding" against the corporation encompasses criminal cause. Rather than supporting petitioners' position, the 1957 amendments to the Maryland Code establish that the statute, in its pre-amendment form applicable to this case, did include criminal proceedings.

II. The judgment below can be sustained on an alternative ground. Section 8 of the Sherman Act defines "person" as including corporations "existing under \* \* \* the laws of any State." The section thus requires reference to state law only to determine whether a corporation "exists" under that law, and not whether state law permits the corporation to be prosecuted. Therefore, if state law continues corporate existence after dissolution, whether or not for purposes of state criminal prosecution, the dissolved corporation remains an "existing" one under Section 8 and continues subject to federal criminal prosecution under the Sherman Act. The test under the Sherman Act is corporate existence, not the nature and extent of

corporate powers and exemptions. Since dissolved corporations continue to exist for many purposes under both Maryland and Delaware law, petitioners "existed" within the meaning of Section 8 of the Sherman Act and could be prosecuted under that Act.

### ARGUMENT

The narrow issue presented by this appeal is whether pending criminal prosecutions under the Sherman Act abated upon dissolution of the defendant Delaware and Maryland corporations. We shall first show that, under the Delaware and Maryland corporation statutes, pending criminal proceedings did not abate upon dissolution of the corporate defendant. As an alternative ground for sustaining the judgment below, we shall also urge (Point II, *infra*) that where a dissolved corporation continues to exist under state law for any purpose (even if not for purposes of state criminal prosecution), it is an "existing" corporation within the meaning of Section 8 of the Sherman Act and thus remains subject to criminal prosecution under that Act.

#### I. UNDER THE DELAWARE AND MARYLAND CORPORATION LAWS, A PENDING CRIMINAL PROCEEDING AGAINST A CORPORATION DOES NOT ABATE UPON THE DISSOLUTION OF THE DEFENDANT

This Court has stated that dissolution of a corporation works an abatement of a pending federal proceeding, unless the federal law or the law of the state of incorporation permits the continuance of the proceeding. *Defense Supplies Corp. v. Lawrence Ware-*

*house Co.*, 336 U.S. 631, 634-5; *Chicago Title and Trust Co. v. Wilcox Bldg. Corp.*, 302 U.S. 120, 124-125; *Oklahoma Gas Co. v. Oklahoma*, 273 U.S. 257, 259. In the instant case, the applicable federal law (Sec. 8, Sherman Act) includes within the purview of "persons" subject to criminal prosecution under Sections 1 and 2 of the Sherman Act, corporations "existing under or authorized by \* \* \* the laws of any State \* \* \*." Assuming that this provision makes the liability of a dissolved corporation to suit dependent upon whether the state of incorporation permits such suit (but, see Point II, *infra*), we believe the court below correctly found that, under the Delaware and Maryland corporation statutes, the pending criminal proceeding did not abate upon corporate dissolution.

Preliminary to their contentions as to the applicable state laws, petitioners have advanced several policy arguments (Br. 10-21). They urge that the purpose of the criminal proceeding is punishment, and that a natural person may not be punished after death. They then argue that corporate dissolution must be equated to the death of a natural person, and, accordingly, that a dissolved corporation cannot be the subject of punishment. This conclusion is consistent with public policy, it is claimed, since the main function of the criminal proceeding—the prevention of further criminal acts—is accomplished by the dissolution.

Petitioners' analogy between corporate dissolution and the death of an individual "has not been the subject of universal admiration \* \* \* and is by no means exact". *Defense Supplies Corp. v. Lawrence Ware*

house Co., *supra*, at p. 634.<sup>2</sup> Criminal actions abate upon the demise of an individual because the levying of a fine would punish the individual's heirs and, in any event, the defendant is no longer able personally to defend against the charges. *United States v. Pomeroy*, 152 Fed. 279 (S.D.N.Y.), reversed on other grounds, 164 Fed. 324; *United States v. Dunne*, 173 Fed. 254; Marcus, *Suability of Dissolved Corporations*, 58 Harv. L. Rev. 675, 681-2. These considerations are inapplicable to the corporate defendant.

A corporation is the business instrumentality of its stockholders and, upon dissolution, the assets of a corporation go to its stockholders. A fine levied on the dissolved corporation would thus affect and punish the same persons as before dissolution—the stockholders. And these stockholders can retain counsel and defend the corporation against criminal charges just as well after dissolution as before. See, e.g., Section 82(b), Article 23, Annotated Code of Maryland (1957); Section 279, Title 8, Delaware Code Annotated (1953). In *Alamo Fence Co. of Houston v. United States*, 240 F. 2d 179, 183 (C.A. 5), the court aptly stated:

In the judicial climate of realism now prevailing, it may be doubted whether the dissolution of a defendant corporation *after* indictment can ever prevent the prosecution from proceeding for the punishment would be suffered by

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<sup>2</sup> See *Addy v. Short*, 47 Del. 157, 163, 166; *Kelley v. Miss. Cent. R. Co.*, 1 Fed. 564, 569-70 (W.D. Tenn.); Marcus, *Suability of Dissolved Corporations*, 58 Harv. L. Rev. 675, 681-83; Comment, *Corporate Dissolution and the Anti-trust Laws*, 21 U. of Chi. L. Rev. 480, 485-86.

the same *real* persons, the stockholders and others financially interested in the corporation, whether the fine against the corporation were recovered before or after dissolution.

Accordingly, as the court below concluded (R. 71), permitting the dissolved corporation to escape criminal responsibility seriously offends public policy. See *United States v. Maryland and Virginia Milk Producers, Inc.*, 145 F. Supp. 374, 375 (D.C. D.C.).<sup>3</sup> This is particularly the case where the corporate dissolution has little or no significance, and the same stockholders retain control over the corporate assets and continue the business through the medium of a different corporation, or a partnership or other unincorporated entity. Thus, in the instant case, petitioners' assets were owned after dissolution by the parent corporation, Schenley, and simply became divisions of a new corporation created by Schenley (R. 19-20,

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<sup>3</sup> Dissolution after indictment for violation of the Sherman Act has occurred several times. See *United States v. Safeway Stores*, 140 F. 2d 834 (C.A. 10); *United States v. Line Material Company*, 202 F. 2d 929 (C.A. 6); *United States v. P. F. Collier & Son Corp.*, 208 F. 2d 936 (C.A. 7); *United States v. United States Vanadium Corp.*, 230 F. 2d 646 (C.A. 10), certiorari denied, 351 U.S. 939; *United States v. Borden Co.*, 28 F. Supp. 177 (N.D. Ill.); *United States v. King*, W.D. Texas, San Antonio Div., Cr. No. 13147, August 23, 1948; *United States v. Anchorage Retail Liquor Dealers Ass'n*, D. Alaska, Third Div., Cr. No. 2379, Feb. 9, 1951; cf. *United States v. Western Pennsylvania Sand & Gravel Ass'n*, 114 F. Supp. 158 (W.D. Pa.). The recent increase from \$5,000 to \$50,000 in the maximum fine for Sherman Act violations (Ch. 281, 69 Stat. 282, Public Law 135, 84th Cong., 1st Sess. (1955)), may encourage corporate defendants to evade their criminal responsibility by changing their corporate structure through mergers and dissolutions, if petitioners' view prevails in this case.

46-47).<sup>4</sup> Criminal fines levied prior to dissolution would punish and deter the petitioners and, in reality, their controlling parent. Such fines, after dissolution, would serve the identical purpose.

In effect, petitioners' position is that Schenley could employ subsidiary corporations to violate the law and then, through the device of voluntary dissolution, escape the penalties imposed by the law upon petitioners for their criminal acts. Clearly, such "absolution" upon dissolution "breed[s] disrespect for law, if indeed it does not encourage lawlessness" (*United States v. Cigarette Merchandisers Ass'n*, 136 F. Supp. 214, at p. 215, n. 5; see, also, Marcus, *Suability of Dissolved Corporations*, 58 Harv. L. Rev. 675, 703).<sup>5</sup> It is no answer to say that corporate officials of petitioners, or the parent Schenley, can still be held criminally responsible. The same argument could be advanced as a reason for never holding any corporate subsidiary criminally liable. Schenley chose to employ these corporate subsidiaries and, as such, they could be held criminally responsible and fined. In

<sup>4</sup> Similarly, in *United States v. Safeway Stores*, 140 F. 2d 834 (C.A. 10) and *United States v. Borden Co.*, 28 F. Supp. 177, 182 (N.D. Ill.), the same subsidiaries were owned after dissolution by the same parent corporation; the dissolution constituted merely a simplification of the parent's corporate hierarchy. See, also, *Walling v. James v. Reuter, Inc.*, 321 U.S. 671, where the corporation continued in business with the same name but as an unincorporated entity.

<sup>5</sup> Petitioners claim (Br. 8) that their dissolution was caused by business reasons "independent of the indictment." But their arguments are equally applicable to a corporation which chooses dissolution solely as a stratagem to escape criminal penalties. For this reason, petitioners' motive in dissolving must be regarded as immaterial.

this case, that quantum of punishment and deterrence which the law seeks to impose upon the offending corporation (and thus its stockholders) is evaded, if the proceedings against petitioners are held to abate.

These policy considerations establish that, just as in the case of civil liability,\* there are compelling reasons why legislation dealing with a corporation's rights and obligations following voluntary dissolution should not permit escape from criminal liability. On the critical issue in this Point, whether the language employed in the particular state statutes does effect that result, these considerations should be given weight. We believe the court below properly construed the Delaware and Maryland statutes as permitting the continuance of criminal proceedings after dissolution.

### *The Delaware statute*

Section 278, Title 8, of the Delaware Code (1953) provides in its second sentence that "any action, suit, or proceeding" begun by or against a corporation before or within a period of three years after dissolution shall continue "until any judgments, orders, or

\* Under state law generally, a Sherman Act civil action brought by the Government would not be abated by dissolution. The Government sometimes files companion civil and criminal cases under the Sherman Act based on the same violations. It would be anomalous, indeed, if the criminal action, which is designed to impose punishment for past violation, were to abate on dissolution of the defendant while the civil suit, designed to terminate violations and prevent recurrence, were to remain pending. See *United States v. P. F. Collier & Son Corp.*, 208 F. 2d 936, 940.

decrees therein shall be fully executed.”<sup>7</sup> This language was added to the section, which previously talked only in terms of prosecuting or defending “suits” during the three-year period after dissolution (21 Del. Laws, Ch. 273, Sec. 36), by proviso in 1925 (34 Del. Laws, Ch. 112, Sec. 9).<sup>8</sup> While the section has not been construed by the Delaware courts as to the issue here involved, and there is no legislative history in the nature of hearings, reports or debates in the Delaware legislature with respect to the section or its amendments, it seems clear that by employing this broad language Delaware sought to include every kind of litigation. As the court stated in *United States v. P. F. Collier & Son Corp.*, 208 F. 2d 936, 940 (C.A. 7), in construing this precise provision:

The words “any action, suit, or proceeding” in their ordinary and generally accepted meaning and use embrace, so we think, all forms of litigation, civil, criminal, bankruptcy and admiralty. The words carry such a plain meaning that they are hardly open to construction, and their employment leaves no room to speculate on the legislative intent.

To the same effect as to this Delaware provision, see *Bahep & Wright v. Commissioner of Internal Reve-*

<sup>7</sup> A similar section dealing with mergers provides that “Any action or proceeding pending by or against” the merged corporation “may be prosecuted as if such \* \* \* merger had not taken place” (Sec. 261, Title 8).

<sup>8</sup> The language of the proviso was clarified by amendment in 1941 (43 Del. Laws, Ch. 132, Sec. 11) and recodified as the second sentence of the section in 1953 (Section 278, Title 8, Delaware Code Annotated, 1953).

*nue*, 176 F. 2d 538, 539 (C.A. 4); *United States v. Maryland and Virginia Milk Producers, Inc.*, 145 F. Supp. 374, 375.

This construction is further supported by the use Delaware itself has made of the word "proceeding." The Delaware Code frequently employs "proceeding" in connection with criminal prosecutions.<sup>9</sup> Thus, Section 1702, Title 11 (1953) begins "Whenever a corporation is informed against in a criminal proceeding \* \* \*." See also Sections 3521, 5121, 5713, Title 11 (1953). And the Rules of Criminal Procedure for the Delaware Superior Court refer throughout to "criminal proceedings." See *e.g.*, Rule 1 "Scope" ("These rules govern the procedure \* \* \* in all criminal proceedings"); Rule 2 "Purpose and Construction" ("These rules are intended to provide for the just determination of every criminal proceeding"), Del. Code Ann. (1953), Vol. 13, pp. 503, 504). In view of this usage of the word "proceeding," it seems likely that the language of Section 278 would have been expressly limited to "civil proceedings" had this limitation been intended.<sup>10</sup>

Other courts, dealing with different statutes, have concluded that these terms, and particularly "proceeding," include criminal prosecutions. *Caha v.*

<sup>9</sup> Where it uses some other term, this usually is the word "case."

<sup>10</sup> The 1953 recodification of the Delaware Code, which changed the proviso of Section 278 into the second sentence thereof, was enacted into law on February 12, 1953, and the legislative draftsmen thereof had before them the new Rules of Criminal Procedure which had been adopted by the Supreme Court of Delaware on November 6, 1952 to become effective on February 12, 1953. See Del. Code Ann. (1953), Vol. 13, p. 497.

*United States*, 152 U.S. 211, 214; *Alamo Fence Co. of Houston v. United States*, 240 F. 2d 179, 183; *United States v. Auerbach*, 68 F. Supp. 776, 780 (S.D. Calif.); *Singleton v. United States*, 290 Fed. 130, 132 (C.A. 4). That "proceeding" and "judgment" are commonly used in connection with criminal prosecutions is further evidenced by the terminology found in the Federal Rules of Criminal Procedure. See, e.g., Rules 1, 2, 21, 29 (a), (b), 32(b), 33-36."

Petitioners rely upon *United States v. Safeway Stores*, 140 F. 2d 834 (C.A. 10); *United States v. Line Material Company*, 202 F. 2d 929 (C.A. 6); and *United States v. United States Vanadium Corp.*, 230 F. 2d 646 (C.A. 10), certiorari denied, 351 U.S. 939, in which the Delaware statute was held not to apply to criminal proceedings. In the latter case, the court simply adhered to the *Safewdy* decision insofar as Delaware law was concerned, on the ground that "one panel of the court should not lightly overrule a decision by another panel" (230 F. 2d at pp. 648-649).

<sup>11</sup> Petitioner cites (Br. 33) *Schwartz v. General Aniline and Film Corp.*, 305 N.Y. 395, in which the New York Court of Appeals (in a four to three decision) construed "action, suit, or proceeding", in a statute relating to reimbursement of corporate officials for litigation expenses, to exclude criminal trials. But the New York court noted that the terms could cover criminal proceedings, "if they stood alone" (p. 403), and based its narrow construction on what it deemed to be the controlling legislative history of the particular statute. The comparable New York corporate dissolution provision, which employs the term "action or proceeding", has been expressly construed to include criminal prosecutions. *United States v. United States Vanadium Corp.*, *supra*, at pp. 649-50; *United States v. Cigarette Merchandisers Ass'n*, *supra*, p. 12; *In re Grand Jury Subpoena Duces Tecum*, 72 F. Supp. 1013 (S.D. N.Y.)

In doing so, the court indicated that members of the panel might not be "in full sympathy" with the *Safeway* decision (*ibid.*). And it took the opposite position with respect to a New York corporation upon a construction of Section 90 of the New York Stock Corporation Law, McK. Consol. Laws, Ch. 59, providing for continuance of any "action or proceeding then pending before any court or tribunal \* \* \*."

In *Safeway* itself, the court placed great stress upon the fact that the corporations had been dissolved before the return of the criminal indictment (140 F. 2d at 836, 840), and in its interpretation of the Delaware statute ignored the words "action or proceeding" and considered only the word "suits."<sup>12</sup> In *Line Material*, the court held that "The dominating term of the section is the word 'suits' which stands alone in the enabling language of the section" (202 F. 2d at p. 932), and accordingly concluded that the addition of the proviso was without significance. Petitioners here advance a similar argument, relying upon the rules of *ejusdem generis* and *noscitur a sociis* to give the admittedly broader word "proceeding" a restrictive meaning (Br. 29-31).

While this line of argument might be available if all of the language being construed had appeared in the section as originally enacted, it ignores the fact that the broader terms "action" and "proceeding," as well as "judgment," were separately added to the section by the Delaware Legislature at a later date.

<sup>12</sup> The court in *Safeway* also construed a California statute which used the word "action" as not applying to criminal prosecutions (140 F. 2d at 838-39).

As the court pointed out in *United States v. P. F. Collier & Son Corp.*, 208 F. 2d 936, 939 (C.A. 7):

This is so whether the proviso be treated merely as explanatory or as an additional enactment. If viewed in the former light, the word "suit," which the legislature had previously employed and which sometimes but not generally included a criminal prosecution, was defined to include "any action" and "any proceeding." If viewed in the latter light, as we think more appropriate, the proviso was intended to and did become the substantive law. [Cf. *Addy v. Short*, *supra*, 47 Del. 157, 162-163, 165-166.]

Petitioners assert that Section 281, Title 8 (Appendix, *infra*, pp. 28-29), of the Delaware Code forbids "payment of a criminal fine levied against the corporation *after* its dissolution" (Br. 25) since it directs the trustee or receiver to pay "all allowances, expenses or costs", "special and general liens", and "other debts due from the corporation". These terms, petitioners assert, apply only to civil actions. But the fact that Delaware may have seen fit to include a special provision in its Corporation Law protecting the rights of creditors of dissolved corporations, does not mean that the trustees or receivers are precluded from taking such actions as may be required as a result of other "actions, suits or proceedings" saved by Section 278. In fact, Section 279 of the Corporation Law (Appendix, *infra*, p. 28) expressly empowers the trustees or receivers of such dissolved corporations generally "to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the un-

finished business of the corporation." There is thus no conflict in language in the Delaware Corporation Code requiring that the words "action," "proceeding," and "judgment" be given a meaning more restrictive than is generally the case.

### *The Maryland statute*

The Maryland Corporation Code contains provisions similar to those of Delaware. Section 72(b), Article 23, Annotated Code of Maryland (1951) (now Section 76(b) of the 1957 Code), provides that the dissolved "corporation shall continue in existence for the purpose of \* \* \* discharging any existing debts and obligations, \* \* \* and doing all other acts required to liquidate and wind up its business and affairs." Section 78(a), Article 23 (1951), provided at the time of the indictment "that dissolution shall not 'abate any pending suit or proceeding by or against the corporation'". The court below found these provisions to be in all essentials equivalent to those of Delaware and accordingly reached a similar result with respect to the two Maryland corporations (R. 73).<sup>13</sup>

Petitioners, focusing on the language "existing debts and obligations" as contained in Section 72(b),

<sup>13</sup> This provision was amended in 1957. The effect of the amendment on this case is discussed below (pp. 21-23).

<sup>14</sup> The Maryland courts have not passed on the issue here presented. However, in *Diamond Match Company v. State Tax Commission*, 175 Md. 234, 245, the Maryland Court of Appeals indicated the broad scope of these provisions, stating "These provisions are broad and intended to cover every liability, although of an undetermined amount \* \* \*." No reason exists for excluding undetermined criminal liability.

above (and also in Section 74(b) (now Section 78(b))—see Appendix, *infra*, pp. 29–30), argue that the language of Section 78(a) precluding the abatement of “any pending suit or proceeding” must be limited to civil suits to avoid internal inconsistency among the several provisions of Article 23 of the Maryland Code. But even assuming the correctness of petitioners’ unsupported assertion that the words “existing debts and obligations” do not encompass criminal liability under an existing indictment,<sup>18</sup> there is no conflict between provisions for the orderly liquidation of corporate assets and the provision continuing “any pending \* \* \* proceeding” against the dissolved corporation. The corporation is continued in existence “for the purpose of \* \* \* doing all other acts required to \* \* \* wind up its business and affairs” (Section 72(b)); and the trustees are similarly empowered “to do all other acts and things consistent with law \* \* \* necessary or appropriate to carry into effect \* \* \* the winding up of its affairs” (Section

<sup>18</sup> In *United States v. Brakes, Inc.*, 157 F. Supp. 916 (S.D.N.Y.), the court held that criminal action is an action upon a “liability or obligation,” within the meaning of the New York dissolution statute. And, in *In re Grand Jury Subpoenas Duces Tecum, supra*, p. 16, the court, in construing the same dissolution statute, stated that the dissolved corporation’s “liability to the United States, both civil and criminal, if violations of the Sherman Act occurred, had become fixed” (p. 1021), and was unaffected by dissolution. So also, petitioners’ violations of the Sherman Act resulted in an “existing obligation” to the United States within the meaning of Sections 72(b) and 74(b).

74(b)). The payment of criminal fines is clearly permissible under these broad powers."

Petitioners also cite (Br. 23-24) the 1957 amendment to Section 78(a) (now Section 82(a)), which deleted the clause "nor shall such dissolution abate any pending suit or proceeding by or against the corporation \* \* \*." They concede, apparently in view of Section 3 of Article 1 of the Annotated Code of Maryland, 1957," that this amendment is not controlling here, and rely on the 1957 changes "solely insofar as they throw light on what those statutes meant before the changes" (Br. 23). Petitioners assert that the deleted provision is now embodied in

"Significantly, the receiver of a dissolved corporation is not specifically vested with power to pay either debts or criminal fines. Instead, he has "all powers necessary" to close the affairs of the corporation (see Section 77(a), now 81(a); Appendix, *infra*, p. 30).

"This Section provides:

The repeal, or the repeal and re-enactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal, shall not have the effect to release, extinguish, alter, modify, or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, section or part thereof, unless the repealing, repealing and re-enacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and re-enacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting or declaring such penalty, forfeiture or liability.

Rule 222 of the Maryland Rules of Procedure, Annotated Code of Maryland (1957), which provides that "An action by or against a corporation shall not abate by reason of the dissolution \* \* \*." They urge that "action" does not include criminal proceedings, and that in any event Rule 222 applies only to civil actions since the rules pertaining to criminal proceedings commence at Rule 701.

But, conceding that Maryland Rule 222 is applicable only to civil suits in view of the definition of "action" in Rule 5(a),<sup>18</sup> the 1957 changes establish that the statute, prior to amendment, did include the criminal proceeding. For, the changes make clear that in Maryland the word "proceeding" is associated with criminal prosecutions. Thus, Rule 5(a) itself refers to "criminal proceedings" (note 18); the 1956 order adopting the rules makes them applicable "to all actions and criminal proceedings" (Annotated Code of Maryland, 1957, Maryland Rules, Vol. 9, p. 216); and the criminal rules refer to "criminal proceedings" (Rules 725(a), 725(b)(2)), as distinguished from "civil actions" (Rule 727(c)).<sup>19</sup> Clearly Section 78(a), in its pre-amendment form applicable to this case (see note 17, *supra*, p. 21), included the criminal

<sup>18</sup> Rule 5(a), Maryland Rules of Procedure, Annotated Code of Maryland (1957), provides in pertinent part: "'Action' shall not include a criminal proceeding."

<sup>19</sup> Significantly, the 1951 Maryland rules also employed "proceedings" in connection with criminal prosecutions. See, e.g., Rule 3(a) of General Rules of Practice and Procedure, Part Four, Vol. 3, Annotated Code of Maryland (1951), p. 4886 ("Pleadings in criminal proceedings \* \* \*"). These rules were interrelated with the Code provisions. Cf. Rule 9 of the General Rules of Practice and Procedure, Part Four (1951).

proceeding when it specified "any pending \* \* \* proceeding".

II. A DISSOLVED CORPORATION WHICH CONTINUES TO EXIST FOR ANY PURPOSE IS AN "EXISTING" CORPORATION WITHIN THE MEANING OF SECTION 8 OF THE SHERMAN ACT AND THEREFORE REMAINS SUBJECT TO CRIMINAL PROSECUTION UNDER THAT ACT

There is an alternative ground for sustaining the judgment below. Sections 1 and 2 of the Sherman Act provide that any "person" who combines or conspires to restrain, or who monopolizes, interstate commerce may be convicted of violation thereof. Section 8 defines "person" as including "corporations \* \* \* existing under or authorized by the laws of any State". Thus, Section 8 requires reference to state law solely to determine whether a corporation "exists" under that law.<sup>20</sup> We urge that if state law

<sup>20</sup> If it were not for the provision of Section 8 of the Sherman Act requiring reference to the state law to determine the status of a corporate criminal defendant, i.e., whether it "exists," the question of continuing liability might be determinable under general federal law (see *Schreiber v. Sharpless*, 110 U.S. 76 (Pet. Br. 17-18); cf. *Barnes Coal Corporation v. Retail Coal Merchants Association*, 128 F. 2d 645, 648 (C.A. 4); *United States v. Leche*, 44 F. Supp. 765 (E.D. La.)). Although we need not reach that issue here, we believe it should be held that pending federal criminal proceedings do not abate upon dissolution of a corporate defendant. For the question is not to be determined merely "by a consideration of the state of the common law \* \* \* in the reign of Edward III, or \* \* \* at the time of the American Revolution," but " \* \* \* from the application of reason to the changing conditions of society". *Barnes Coal Corporation v. Retail Coal Merchants Association*, *supra*, at p. 648; see also *Funk v. United States*, 290 U.S. 371; *Hurtado v. California*, 110 U.S. 516, 530; *Shayne v. Evening Post Publishing Co.*, 168 N.Y. 70. For the reasons previously

continues corporate existence after dissolution, whether or not for purposes of state criminal prosecution, the dissolved corporation remains an "existing" one under Section 8 and therefore continues subject to federal criminal prosecution under the Sherman Act. Cf. *Bahen & Wright, Inc. v. Commissioner of Internal Revenue*, 176 F. 2d 538, 540 (C.A. 4).

The language of Section 8, read in its ordinary and natural sense, means simply that any corporation which exists under state law may be prosecuted under the Sherman Act. It does not say, as petitioners would in effect have it, that the corporation must "exist and be capable of being criminally prosecuted under state law." The "sweeping" definition of "person" in Section 8 was plainly designed "to preclude any narrow interpretation" of the categories of persons subject to criminal penalties for violation of the Sherman Act (*United States v. Cooper Corp.*, 312 U.S. 600, 607). Congress clearly did not intend to leave enforcement of the Sherman Act dependent on whether the particular State would permit the United States to bring suit. *Northern Securities Co. v. United States*, 193 U.S. 197, 344-47.

Thus, if a State, in authorizing a corporation and specifying the purposes for which it exists, explicitly provided that the corporation could not be criminally prosecuted, such a provision would not immunize the

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developed (pp. 8-13), the drastic change in the role of the corporation in society requires that there be no abatement. See *Alamo Fence Co. of Houston v. United States*, 240 F. 2d 179, 183 (C.A. 5); see Marcus, *Suability of Dissolved Corporations*, 58 Harv. L. Rev. 675, 677-80, for a discussion of the corporate role in early English society.

corporation from criminal proceedings under the federal antitrust laws. *Northern Securities Co. v. United States*, 193 U.S. 197, 345-346; *Alamo Fence Co. of Houston v. United States*, 240 F. 2d 179, 183 (C.A. 5). Similarly, during the dissolution period, a state cannot continue the corporation in existence for purposes it specifies, and yet immunize it from Sherman Act prosecution. As the court stated in the *Alamo* case (p. 183), " \* \* \* we have no doubt that a state can no more continue the existence of one of its corporations and at the same time immunize it against criminal prosecution, than it could have created the corporation in the first instance with such immunity." See, also, *United States v. P. F. Collier & Son Corp.*, 208 F. 2d 936, 940-941 (C.A. 7) (concurring opinion). The fact of corporate existence, and not the nature and extent of corporate powers and exemptions, is the statutory test under the Sherman Act.

Under both Maryland and Delaware law, dissolved corporations continue to exist for many purposes. Thus, Maryland provides that "the corporation shall continue in existence" for the purpose of paying debts, collecting and distributing assets, and "doing all other acts required to \* \* \* wind up its business \* \* \*" (Section 76(b), Annotated Code of Maryland (1957)). Delaware provides that all corporations shall "be continued" as "bodies corporate" for three years after dissolution for purposes of prosecuting or defending litigation pending at dissolution or instituted within that period, and of "enabling them gradually to settle and close their business" (*supra*, pp. 3, 13-14, 18-19). In *Addy v. Short*, *supra*, the Dela-

ware Supreme Court made it clear that a dissolved corporation continues in existence during this three-year period, with "[w]hatever rights it had, of whatever nature, \* \* \* preserved in full vigor" (47 Del. 157, 163). See, also, *United States v. Bates Valve Corp.*, 39 F. 2d 162 (D. Del.).<sup>21</sup>

In short, "the State has elected to keep the corporation in existence, maimed but still alive", and it cannot "preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of federal law." Mr. Justice Cardozo, dissenting in *Chicago Title and Trust Co. v. Wilcox Bldg. Corp.*, 302 U.S. 120, 131.<sup>22</sup> Having been continued in existence by the applicable state laws, petitioner "existed" within the meaning of Section 8 of the Sherman Act and could be prosecuted under that Act.

<sup>21</sup> The status of corporations during a statutory dissolution period has generally been regarded in this fashion. See, e.g., *United States v. P. F. Collier & Son Corp.*, *supra*, at p. 940 (concurring opinion); *Stentor Electric Manufacturing Company v. Klaxon Company*, 115 F. 2d 268, 271 (C.A. 3); *Cushman v. Warren-Scharf Asphalt Paving Company*, 220 Fed. 857, 862 (C.A. 7); *In re Booth's Drug Store, Inc.*, 19 F. Supp. 95, 96-97 (W.D. Va.); *Hunt v. Columbia Insurance Company*, 55 Me. 290.

<sup>22</sup> Justices Stone and Black joined in this dissent. The *Chicago Title* case did not decide the issue here presented. It held only that a dissolved Illinois corporation could not, after expiration of the two-year period within which dissolved corporations could sue or be sued under state law, file a petition for reorganization under Section 77B of the Federal Bankruptcy Act. The holding is not dispositive of the question whether a pending federal criminal action is abated by dissolution of a corporate defendant which, under state laws, continues to exist thereafter for many purposes.

**CONCLUSION**

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted.

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## APPENDIX

Section 279, Delaware General Corporation Law, Title 8, Chapter 1, Delaware Code Annotated, 1953, provides:

When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor or stockholder of the corporation, at any time, may either appoint one or more of the directors thereof trustees, or appoint one or more persons to be receivers, of and for the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.

Section 281, Delaware General Corporation Law, Title 8, Chapter 1, Delaware Code Annotated, 1953, provides:

The trustees or receivers of a dissolved corporation, after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation, if the funds in their hands shall be

sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose. If there shall be any balance remaining after the payment of the debts and necessary expenses, they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation, or their legal representatives.

Section 72(b), Article 23, Annotated Code of Maryland, 1951 (now Section 76(b) of the 1957 Code) provides:

(b) *Time dissolution effective; continuance of existence for certain purposes.*—The dissolution of the corporation shall be effective when the articles of dissolution have been accepted for record by the Commission, provided, however, that the corporation shall continue in existence for the purpose of paying, satisfying and discharging any existing debts and obligations, collecting and distributing its assets, and doing all other acts required to liquidate and wind up its business and affairs.

Section 74(b), Article 23, Annotated Code of Maryland, 1951 (now Section 78(b) of the 1957 Code) provides:

(b) *Powers of directors as trustees.*—In the liquidation of the corporation and the winding up of its affairs, such trustees shall, until a receiver is appointed by such court, be vested, in their capacity as trustees, with full title to all the property and assets of the corporation. They shall proceed to collect and distribute the assets of the corporation, applying such assets to the extent available to the payment, satisfaction and discharge of existing debts and obligations of the corporation, including necessary expenses of liquidation, and distributing the

remaining assets among the stockholders. They shall have power to carry out the contracts of the corporation; they may sell all or any part of the assets of the corporation at public or private sale; they may sue or be sued in their own names as trustees, or, notwithstanding such dissolution, in the name of the corporation; and they shall have power to do all other acts and things consistent with law and the charter of the corporation, necessary or appropriate to carry into effect the liquidation of the corporation and the winding up of its affairs. The will of a majority of the trustees shall govern.

Section 77(a), Article 23, Annotated Code of Maryland, 1951 (now Section 81(a) of the 1957 Code) provides:

(a) *As to assets and liabilities.*—The receiver of any corporation of this State appointed by a court pursuant to this Article, whether the dissolution of the corporation is voluntary or involuntary, shall be vested with full title to all the property and assets of the corporation and with full power to enforce obligations or liabilities in favor of the corporation; he shall proceed to liquidate the assets of the corporation and close its affairs under the supervision of the court and shall have all powers necessary for that purpose.